Supreme Court, U.S.
FILED
JUL 5 - 2004
OFFICE OF THE CLERK

No. 03-1388

IN THE

# Supreme Court of the United States

DOUGLAS SPECTOR, et al.,
*Petitioners,*

*vs.*

NORWEGIAN CRUISE LINE LTD.,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## BRIEF OF *AMICUS CURIAE* INTERNATIONAL COUNCIL OF CRUISE LINES IN SUPPORT OF RESPONDENT

LAWRENCE W. KAYE
*Counsel of Record*
AKSANA MOSHAIV

**KAYE, ROSE & MALTZMAN, LLP**

1801 Century Park East, Suite 1500
Los Angeles, California 90067
(310) 277-1200

*Attorneys for Amicus Curiae*
INTERNATIONAL COUNCIL OF CRUISE LINES

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

No. 03-1388

IN THE

# Supreme Court of the United States

DOUGLAS SPECTOR, et al.,
*Petitioners,*

*vs.*

NORWEGIAN CRUISE LINE LTD.,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## BRIEF OF *AMICUS CURIAE* INTERNATIONAL COUNCIL OF CRUISE LINES IN SUPPORT OF RESPONDENT


LAWRENCE W. KAYE
*Counsel of Record*
AKSANA MOSHAIV

**KAYE, ROSE & MALTZMAN, LLP**

1801 Century Park East, Suite 1500
Los Angeles, California 90067
(310) 277-1200

*Attorneys for Amicus Curiae*
INTERNATIONAL COUNCIL OF CRUISE LINES

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii

INTRODUCTION ..... 1

INTEREST OF *AMICUS CURIAE* ..... 1

SUMMARY OF ARGUMENT ..... 4

ARGUMENT ..... 6

I. THE SPLIT BETWEEN THE FIFTH AND ELEVENTH CIRCUITS ON THE ADA'S APPLICATION TO FOREIGN SHIPS HAS CREATED CONFUSION OF NATIONAL AND INTERNATIONAL MAGNITUDE, WHICH THIS COURT SHOULD RESOLVE ..... 6

A. The Lack of Any Congressional Mandate for Applying the ADA Extraterritorially Has Created a Quagmire in the Cruise Industry ..... 6

B. The Absence of Regulations Has Compounded the Confusion Caused by Congress's Failure to Address the ADA's Application to Foreign Ships .... 13

Page

II. REQUIRED UNIFORMITY IN ACCESSIBILITY STANDARDS AND MARITIME LAW IS LOST WITHOUT A STATUTORY AND REGULATORY FRAMEWORK. ..... 17

CONCLUSION ..... 20



## TABLE OF AUTHORITIES

Page

### Cases

*Access Now, Inc. v. Holland Am. Line-Westours, Inc.*, and *Costa Crociere, S.P.A.*, 147 F. Supp. 2d 1311 (S.D. Fla. 2001) ..... 14

*American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828) ..... 18

*Assoc. for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353 (S.D. Fla. 2001) ..... 14

*Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957) ..... 7

*Deck v. American Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057 (D. Haw. 1999) ..... 4, 14

*EEOC v. Arabian American Oil Co. ("Aramco")* 499 U.S. 244 (1991) ..... 6-9

*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920) ..... 18

*McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) ..... 7

*Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) ..... 18

**Page**

*Resnick v. Magical Cruise Co. Ltd.*,
148 F. Supp. 2d 1298 (M.D. Fla. 2001) ..... 14

*Sea-Land Servs., Inc. v. Gaudet*,
414 U.S. 573 (1974) *reh. denied*,
415 U.S. 986 (1974) ..... 18

*Spector v. Norwegian Cruise Line Ltd.*,
356 F.3d 641 (5th Cir. 2004) ..... 9, 14

*Stevens v. Premier Cruises, Inc.*,
215 F.3d 1237 (11th Cir. 2000),
*reh'g denied, reh'g, en banc, denied*,
284 F.3d 1187 (11th Cir. 2002) ..... 9, 11, 14

*The Lottawanna*,
88 U.S. (21. Wall.) 558 (1874) ..... 18, 19

**Other Cases**

*Access Now, Inc. v. Carnival Corp.*,
No. 98-3081 (S.D. Fla. 1998) ..... 14

*Access Now, Inc. v. Celebrity Cruises, Inc.*,
No. 00-2254 (S.D. Fla. 2000) ..... 14

*Access Now, Inc. v. Cunard Line Ltd.*,
No. 00-7233 (S.D. Fla. 2000) ..... 14

*Access Now, Inc. v. Royal Caribbean Cruises, Ltd.*,
No. 00-2?55 (S.D. Fla. 2000) ..... 14



**Page**

*Ernst-Rosenkrantz v. Carnival Corp.*,
No. 99-0267 (S.D. Fla. 1999) ..... 14

*Giacopini v. Crystal Cruises, Inc.*,
No. C-04-1089 (N.D. Cal. 2004) ..... 14

*Walker v. Carnival Cruise Lines*,
No. C-98-2926 (N.D. Cal. 1998) ..... 14

*Zetwick v. Carnival Corporation*,
No. C-02-0740 (N.D. Cal. 2002) ..... 14

**Statutes**

42 U.S.C. § 12101(b) ..... 17
42 U.S.C. § 12111 (4) ..... 8
42 U.S.C. § 12112(c) ..... 8
42 U.S.C. § 12112(c)(1) ..... 8
42 U.S.C. § 12112(c)(2) ..... 8
42 U.S.C. § 12112(c)(2)(C) ..... 8
42 U.S.C. § 12181(7), (10) ..... 7
42 U.S.C. § 12186(a)(1)(b)-(c) ..... 13
46 U.S.C. § 289 ..... 11
46 U.S.C. § 883 ..... 11
46 U.S.C. § 2101(12) ..... 11

**Regulations**

19 C.F.R. § 4.80a(a)(1) ..... 11
28 C.F.R. PT. 36, App. B ..... 13
56 Fed. Reg. 45,584, 45,599, 45,600 (Sept. 6, 1991) ... 13

Page

**Constitution**

Admiralty Clause, Article III, § 2, Clause 1 ..... 18
Commerce Clause, Article I, § 8, Clause 3 ..... 18

**Conventions**

Convention on Load Lines, 18 U.S.T. 1857, T.I.A.S. No. 6331 (1966) ..... 10

Convention on the International Maritime Organization, 9 U.S.T. 621, T.I.A.S. No. 4044, Part I, Article 1(a)(b) (1948) ..... 12

International Convention for the Safety of Life at Sea ("SOLAS") 32 U.S.T. 47, T.I.A.S. No. 9700 (1974) ..... 3, 10, 15

**Other Authorities**

ADA TECHNICAL ASSISTANCE MANUAL, U.S. DEP'T OF JUSTICE, § III-5.3000, illus. 3 (1993). ..... 15

Australia's Disability Standards for Accessible Public Transport ..... 12

Canada's Code of Practice, Ferry Accessibility for Persons with Disabilities ..... 12



Page

Disability Rights Education and Defense Fund A to Z List ..... 12

House Comm. on Educ. & Labor, 101st Cong., Legislative History of Public Law 101-336 (1990) ..... 7

IMO Maritime Safety Commission "Recommendation on the Design and Operation of Passenger Ships to Respond to Elderly and Disabled Persons' Needs" ..... 10, 12

PVAAC Recommendations for Accessibility Guidelines for Passenger Vessels: Final Report December 2000 ..... 15

Restatement (Third) of the Foreign Relations of the United States § 502 comments a and b ..... 10

United Kingdom's, Design of Large Passenger Ships and Passenger Infrastructure: Guidance on Meeting the Needs of Disabled People ..... 12

## INTRODUCTION

The International Council of Cruise Lines ("ICCL") strongly advocates accessibility aboard cruise ships for individuals with disabilities, neither supports nor endorses discriminatory practices or procedures, and embraces the policy considerations underpinning the Americans With Disabilities Act ("ADA"). Nonetheless, Congress's failure to express its intent to apply Title III of the ADA to ships built and registered abroad, and that embark and call in countless foreign nations, has caused great uncertainty over accessibility standards when these ships embark in the U.S. The additional regulatory void resulting from the failure of the U.S. Department of Transportation ("DOT") or the Department of Justice ("DOJ") to promulgate any accessibility regulations in the cruise industry has resulted in a quagmire for ship owners, passengers, travel agents and the judiciary nationwide. The Fifth and Eleventh Circuits' conflicting rulings regarding the ADA's application to foreign ships have greatly compounded the confusion created by the lack of any legislative or regulatory mandate, requiring clarification by this Court.

## INTEREST OF *AMICUS CURIAE*[1]

The ICCL, based in Arlington, Virginia, is the leading nonprofit trade association representing the interests of its 16 member cruise lines and more than 95 associate member companies in a diverse array of domestic and international

---

[1] The parties' letters of consent for the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus Curiae*, its members or its counsel has made a monetary contribution to this brief, preparation or submission.

forums. ICCL's members include the largest passenger cruise lines trading in hundreds of ports around the globe, and among its associate members are leading industry suppliers and strategic business partners. Each year ICCL's overnight cruise ship operators carry more than ten million passengers on over 115 ships, the largest of which transport more than thirty-five hundred guests per voyage. In addition to carrying U.S. citizens, ICCL vessels embark many foreign citizens, both in the U.S. and abroad.

The cruise industry's responsiveness in providing equal, integrated access to all its guests has generated a substantial and growing percentage of those traveling with special needs. For many years ICCL member lines have provided access for persons with mobility restrictions, communication impairments, chronic illnesses and other conditions which could be termed "disabilities" under the ADA. Despite the unique challenges invariably encountered in the shipboard environment, ICCL cruise ships routinely accommodate wheelchairs, electric mobility devices and service animals; provide wheelchair-accessible cabins and public areas, and communication auxiliary aids; and have modified practices and procedures in an effort to accommodate all guests. However, numerous technical issues are associated with harmonizing accessibility standards and internationally mandated construction and safety requirements for ships engaged in international commerce.

Title III of the ADA, governing public accommodations, does not extend U.S. accessibility standards to guests on foreign ships. Neither the DOT nor DOJ has implemented any regulations under Title III governing accessibility on passenger vessels. These agencies have indicated that before promulgating regulations for foreign ships, potential conflicts with international design, construction and operational standards must first be reconciled. The complete absence of any statutory or regulatory framework for applying Title III to



foreign ships raises serious practical issues not addressed by petitioners. Although petitioners declined to raise the impact of the absence of regulations in addition to any expression of congressional intent, *Amicus* would ask the Court to consider this aspect of the issue presented in the Petition, namely the *extent* to which the ADA *can* be applied in its present form.

In the international arena, ICCL works with leading flag and port state administrations, shipping associations, classification societies, lawmakers and regulators, both in the U.S. and abroad, on technical, safety, security and environmental issues. The International Maritime Organization ("IMO"), an agency of the United Nations, reviews current maritime issues and sets international law by adopting conventions and treaties among its 163 member nations. The IMO is responsible for establishing global standards for cruise ship safety, design and construction. ICCL serves as a Non-Governmental Organization in consultative status to the IMO. Over the years representatives of ICCL's experienced technical and legal committees and working groups have actively participated in IMO deliberations, including the development of several conventions. One of the most significant ones was the International Convention for the Safety of Life at Sea ("SOLAS") (32 U.S.T. 47, T.I.A.S. No. 9700 (1974)), which was ratified by the United States and mandatorily governs ship design, construction and operation.

Seeking to foster the creation of uniform and specific accessibility standards for its members' ships, ICCL has also participated directly in that regulatory process, both at the national and international level. ICCL was heavily involved in the IMO Maritime Safety Committee and working group that in 1996 formulated and adopted worldwide passenger vessel guidelines addressing design and operation features for accommodating persons with disabilities. In the United States, from 1998 through 2000, ICCL representatives were members and/or participants of the Passenger Vessel Access

Advisory Committee ("PVAAC"), established by the United States Architectural and Transportation Barriers Compliance Board ("U.S. Access Board"). The Committee's objective was to provide recommendations regarding accessibility onboard passenger ships.

To date, however, Congress has never clarified whether or to what extent Title III applies to foreign vessels. No accessibility guidelines or regulations have been adopted in the United States for cruise ships in the 14 years since the ADA was enacted.

## SUMMARY OF ARGUMENT

Of the more than 100 foreign cruise ships visiting the North American continent annually, some routinely embark passengers in U.S. ports, others do so occasionally, and several only rarely schedule U.S.-based voyages. The ships vary in size, age, nation of construction and registry. The confusion over the extent of the ADA's application in these varied contexts has fomented litigation in many jurisdictions by advocacy groups and individuals who, regardless of their good intentions, seek to impose their own accessibility standards on this international industry. Judges in various jurisdictions are being forced to guess what Congress and the regulatory agencies intend to be the required level of accessibility. The lawsuits have resulted in inconsistent rulings on the extent of the ADA's application, and forum shopping by attorneys who are awarded fees if they prevail in prosecuting these actions.

Nowhere in Title III has Congress stated or implied that the statutory scheme was meant to be applied extraterritorially, to foreign facilities that visit the U.S. or are visited by American citizens. The legislative history is likewise devoid of any such intent or discussion. Congress evidently never considered the potential for a foreign facility, such as a



cruise ship, to relocate to the U.S. on a long-term, temporary or only occasional basis, and therefore never addressed the reach of Title III at sea. Absent an expression of Congress's intent, ignoring the well-established presumption against extraterritorial application of U.S. laws under these complex circumstances is unprecedented.

Petitioners' assumption that Congress must have intended extraterritorial application of the ADA, or that application to foreign ships when in U.S. waters is not "extraterritorial," is unsupported. Contrary to petitioners' suggestion, accessibility onboard foreign ships clearly implicates the "internal affairs" of every vessel, even during the periods they enter U.S. waters, given the plethora of foreign and international laws within which these same ships must function.

Congress directed both the DOT and DOJ to enact specific accessibility regulations for covered entities to give the Act meaning, and even delayed the ADA's effective date to allow time to promulgate them and first permit voluntary compliance. Under the Administrative Procedures Act ("APA"), adopting such regulations requires public notice and comment by interested parties. This process was duly completed for shore side facilities by DOT and DOJ within the congressionally-prescribed deadline. Those facilities knew what the specific accessibility requirements were before liability could be imposed for alleged violations.

No regulations addressing construction, alteration, barrier removal, or policies and procedures of any kind were ever adopted for cruise ships. Both DOT and DOJ, the agencies with expertise to address these matters, have consistently stated their shore side regulations do not apply to ships due to the substantial differences with facilities on land and the limitations of the marine environment. In addition to the obvious physical differences, passenger vessels must be self sufficient in providing crisis management in a marine casualty and do not have the same recourse to shore-based emergency

resources as do accommodations located on land. These vital distinctions dictate particular design and operational features and safety considerations. Nonetheless, the courts, which are ill-equipped to do so, have been faced with the daunting task of reconciling conflicting proposals of interested parties with foreign and international shipbuilding and safety mandates. The resulting dilemma is especially acute considering the continuous movement of ICCL's vessels to different foreign and domestic jurisdictions, the unique legal and physical environment in which they operate, and the Constitutional requirement for uniformity in maritime matters repeatedly emphasized by the Supreme Court.

ICCL therefore urges the Court to grant the Petition and provide much-needed guidance on whether Title III of the ADA can be applied to foreign ships under the existing scheme.

## ARGUMENT

### I. THE SPLIT BETWEEN THE FIFTH AND ELEVENTH CIRCUITS ON THE ADA'S APPLICATION TO FOREIGN SHIPS HAS CREATED CONFUSION OF NATIONAL AND INTERNATIONAL MAGNITUDE, WHICH THIS COURT SHOULD RESOLVE.

#### A. The Lack of Any Congressional Mandate for Applying the ADA Extraterritorially Has Created a Quagmire in the Cruise Industry.

A congressional mandate to apply the ADA extraterritorially is required before the Act can be interpreted to reach foreign vessels. Congress may apply U.S. law to foreign flag vessels in the U.S., but whether it chooses to exercise that power is a matter of statutory construction. *EEOC v. Arabian*



*American Oil Co. ("Aramco")* 499 U.S. 244, 248 (1991). For domestic laws to be applied to foreign vessels entering United States waters, "there must be present the affirmative intention of Congress clearly expressed." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 22 (1963), quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). The *Aramco* holding affirmed the principle that laws passed by Congress are presumed not to apply beyond the territorial jurisdiction of the U.S. "unless a contrary intent appears." 499 U.S. at 248. That legislative intent must be found in "specific language" and cannot be deduced from "boilerplate language which can be found in any number of congressional acts."[2] *Id.*, 499 U.S. at 250-51. Likewise, broad references to "foreign commerce" or to commerce between "any of the States or territories and any foreign nation or nations," do not show Congress's affirmative intent to apply the law extraterritorially. *Id.*, 499 U.S. at 251.

Examining Title III of the ADA and its legislative history demonstrates that no specific language, or any language whatsoever, applies the Act extraterritorially, supporting the notion that Congress did not intend or even envision applying the Act extraterritorially at all.[3] This conclusion is further bolstered by the fact that Congress never acknowledged potential conflicts between Title III and foreign laws, or the impact of unilaterally extending U.S. accessibility standards to international maritime commerce.

---

[2] The *Aramco* Court specifically referred to the ADA as an example of an Act with such "boilerplate language" that would not be sufficient to establish the requisite congressional intent. 499 U.S. at 251.

[3] Although the statute contains an exhaustive list of "public accommodations" and "specified public transportation," it does not even mention ships, let alone foreign flag ships. 42 U.S.C § 12181(7), (10). *See also* House Comm. on Educ. & Labor, 101st Cong., Legislative History of Public Law 101-336 (1990), which in over 3000 pages of published legislative history makes no mention of cruise ships.

By stark contrast, Title I of the same Act, which governs employment, contains several provisions expressly addressing extraterritorial application. The very definition of "employee" includes U.S. citizens working abroad. (42 U.S.C. § 12111 (4)). Congress specifically extended Title I to "covered entities in foreign countries" (42 U.S.C. § 12112(c)), and "control of [a foreign] corporation" by an American employer (*Id.*, subsection (2)). Title I prescribes a set of statutory criteria for determining whether an American employer controls a foreign corporation for purposes of invoking the ADA (*Id.*, subsection (2)(C)). Congress even delineated Title I's outer extraterritorial reach by specifying discrimination claims do not lie for actions required by foreign law. (42 U.S.C. § 12112(c)(1)). These provisions clearly evidence Congress's intent to apply Title I to American employees working in foreign countries for companies that are controlled by American employers. In so doing, Congress enunciated its considered judgment concerning the interplay between Title I of the ADA and applicable foreign laws.

Title I proves that Congress knows how to express its intent to apply U.S. law extraterritorially. The legislature's failure to express any such intent in Title III demonstrates just as clearly that Congress did not intend the Act to apply to public accommodations beyond the U.S., such as foreign cruise ships.[4] DOT's and DOJ's failure to assert their

[4] As the court in *Aramco* noted, "Congress's awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute." 499 U.S. at 258. The *Aramco* Court listed various examples of such congressional expressions, and in refusing to interpret Title VII as having extraterritorial application without clear congressional expression, concluded that "Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot." 499 U.S. at 259. In response, Congress amended both Title VII and *only* Title I of the ADA, providing limited foreign



regulatory power over foreign ships since the ADA was passed, even if so authorized by Congress, evidences these agencies' own understanding that there are limits to Title III's application at sea. The lack of congressional intent for any extraterritorial application, let alone to what extent, has now resulted in two conflicting circuit court decisions. *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000), *reh'g denied, reh'g, en banc, denied*, 284 F.3d 1187 (11th Cir. 2002) [holding Title III applies to foreign cruise ships and rejecting presumptions against extraterritorial application of U.S. law or to the internal affairs of ships], and *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 650 (5th Cir. 2004) [holding Title III does not apply to foreign-flagged cruise ships "until Congress clearly expresses its intention to do so."]. The Eleventh Circuit has held international cruise lines must remove architectural barriers to comply with the ADA whenever embarking Americans in U.S. ports, yet no regulations have been promulgated to provide guidance on the type of structural changes required to achieve compliance. Operators are thus exposed to arbitrary liability on a jurisdiction-by-jurisdiction basis. In the Fifth Circuit the barrier removal provisions of the ADA do not apply to foreign ships at all.

The question of whether the ADA extends to such vessels, and if so to what degree, must be resolved by Congress. Applying Title III to a ship clearly anticipates permanent structural changes, inevitably giving Title III extraterritorial application to any foreign cruise ship that enters the U.S., however infrequently, but also travels abroad. Similarly, adoption of standards governing the degree of wheelchair accessibility, or for patrons with vision or hearing impairments, has direct impact on the procedures to be

application. Title III has not been so amended, even after the potential of international implication has been brought to Congress's attention through the *Aramco* decision.

followed in emergencies on foreign vessels in international waters. Therefore, extending Title III to ships necessarily affects their internal affairs. Under international law, the term "internal management and affairs" of the ship extends well beyond labor and employment matters, including, for example, "adopting and enforcing laws to protect the welfare of the crew *and passengers* aboard a ship and to maintain good order thereon," and ensuring safety at sea with regard to "the construction, equipment, and seaworthiness of ships . . . the manning of ships, . . . and the training of crews . . . ." Restatement (Third) of the Foreign Relations of the United States § 502, comments a and b (emphasis added). Nothing can be more internal to a ship than its structure, layout and operation, all aspects of which are currently governed by international law.

Before imposing vague and undelineated ADA requirements on foreign cruise ships, Congress must consider the existing international maritime regime. These standards include, for example, current IMO recommendations for vessel design and operation with regard to accessibility,[5] SOLAS' technical, structural, safety and operational mandates, and the International Convention on Load Lines governing watertight integrity aboard oceangoing vessels.[6] Without statutory clarification no one can determine whether the ADA applies to foreign cruise ships at all. If so, should Title III apply to every ship embarking in the U.S., only those that do so with certain regularity, based upon the percentage of U.S.

---

[5] The IMO, through the Maritime Safety Commission ("MSC"), published its "Recommendation on the Design and Operation of Passenger Ships to Respond to Elderly and Disabled Persons' Needs" on June 24, 1996. *See* IMO's MSC Circular 735.

[6] Among the requirements of the Convention on Load Lines, 18 U.S.T. 1857, T.I.A.S. No. 6331 (1966), ratified by the United States, is the installation of watertight doors in specified compartments, necessitating the existence of raised sills and thresholds.



passengers carried, or according to some other criteria? No mechanism for resolving conflicts between U.S. and international accessibility and construction standards is included in Title III.

Most of the world's cruise ships reposition among multiple jurisdictions throughout each year, both in the U.S. and abroad. A typical ship might spend the winter months sailing the Caribbean on voyages originating in Florida or Texas, embark passengers throughout the spring in Italy or Spain for Mediterranean cruises, and transfer to Canada for summer embarkations in Vancouver with visits to ports in Alaska. In fact, under longstanding U.S. cabotage laws, foreign ships are ineligible to engage in so-called "coastwise trade" within the United States and must travel to foreign ports as part of an international voyage. *See* Passenger Services Act, 46 U.S.C. § 289, and Jones Act, 46 U.S.C. § 883.[7] Were every foreign jurisdiction to apply its own accessibility standards to international cruise ships embarking passengers in local waters, as was done in *Stevens*, the potential for an operational dilemma is clear.[8] A number of other nations have currently proposed or enacted their own regulations establishing accessibility standards for transporting

---

[7] The term "coastwise port" refers to a "port in the U.S., its territories, or possessions embraced within the coastwise laws." 19 C.F.R. § 4.80a(a)(1). The term "foreign vessel" is defined in 46 U.S.C. § 2101(12) as "a vessel of foreign registry or operated under the authority of a country except the United States."

[8] For illustration purposes, ICCL member cruise lines will embark passengers in all of the following foreign nations within the next year: Africa, Argentina, Aruba, Australia, Barbados, Brazil, Canada, Chile, China, Costa Rica, Denmark, Ecuador, Egypt, England, France, Bahamas, Greece, Iceland, India, Italy, Japan, Malta, Mexico, Monaco, Netherlands, New Zealand, Norway, Panama, Peru, Portugal, Russia, Seychelles, South Africa, Spain, Sweden, Tahiti, Thailand, Turkey, United Arab Emirates, and Vietnam.

passengers with disabilities.[9] The unilateral imposition of domestic accessibility laws would destroy international uniformity and defeat the goal of national administrations to develop effective and consistent standards.[10] Certainly, Congress did not envision such a scenario. The legislature must necessarily first consider how far U.S. laws should reach along with the implication of any exercise of national power on the international maritime community.

---

[9] *See* United Kingdom's, Design of Large Passenger Ships and Passenger Infrastructure: Guidance on Meeting the Needs of Disabled People, which is modeled after IMO's guidelines of MSC Circular 735, *available at* <http://www.dptac.gov.uk/pubs/guideship/index.htm>; Canada's Code of Practice, Ferry Accessibility for Persons with Disabilities, *available at* <http://www.cta-otc.gc.ca/access/codes/ferry/index_e.html>; Australia's Disability Standards for Accessible Public Transport, *available at* <http://law.gov.au/www/civiljusticehome.nsf/AllDocs/RWP2D7CECE1EA698DC4CA256C1D00001E0B?OpenDocument>. *See also* the Disability Rights Education and Defense Fund A to Z list of all nations with laws protecting individuals with disabilities, *available at* <http://www.dredf.org/international/lawindex.html>.

[10] The international goal of achieving uniformity in maritime commerce was long ago recognized with the creation of the IMO, the purpose of which was, in part "to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety and efficiency of navigation," and "to encourage the removal of discriminatory action and unnecessary restrictions by Governments affecting shipping engaged in international trade so as to promote the availability of shipping services to the commerce of the world without discrimination." Convention Establishing the Inter-Governmental Maritime Consultative Organization, (renamed Convention on the International Maritime Organization in 1982), 9 U.S.T. 621, T.I.A.S. No. 4044, Part I, Article 1(a)(b) (1948).



## B. The Absence of Regulations Has Compounded the Confusion Caused by Congress's Failure to Address the ADA's Application to Foreign Ships.

Congress directed the DOT and DOJ to enact specific regulations establishing accessibility standards for covered entities within one year of the Act's passage. 42 U.S.C. § 12186(a)(1)(b)-(c). Such regulations have been developed for shore side facilities of almost every conceivable type, after inviting the public's comment under the APA. Yet none of those regulations mention vessels of any kind, nor any of their appurtenances or features, such as the number of accessible cabins; routes of ingress or egress (i.e., gangways, hatches or ladders); accessibility standards for life boats, tenders, passageways, raised door thresholds or shipboard lifts; or any of the numerous other structures located on ships. More important, both the DOT and DOJ have expressly acknowledged cruise ships are so different from land structures that they require special consideration, including their own set of accessibility guidelines and exemption from the shore side regulations.[11] Even if the DOT and DOJ promulgate regulations for cruise ships, the extent to which they apply to

---

[11] In 1991, the DOT observed that "at the present time, the Department lacks sufficient information to determine what are reasonable accessibility requirements for various kinds of passenger vessels... [The DOT] anticipates working with the Access Board and DOJ on further rulemaking to define requirements for passenger vessels." 56 Fed. Reg. 45,584, 45,599 (Sept. 6, 1991). The DOT also noted that before promulgating specific requirements for foreign flag ships it would need to determine whether any treaty provisions, such as SOLAS, to which the U.S. is a signatory, might conflict with the ADA and its regulations. *Id.* At 45,600. Likewise, the DOJ declared it "will not interpret the new construction and alterations provisions of Subpart D" to apply to cruise ships "pending further development of specific requirements." 28 C.F.R. PT. 36, App. B at 664.

foreign vessels would nevertheless remain entirely unclear unless Congress first amends Title III, as it has done with Title I, to specify under what criteria that application is triggered. Any regulations purporting to govern accessibility characteristics on foreign ships, without appropriate amendments to Title III, would exceed the scope of the federal agencies' authority.

Meanwhile, numerous lawsuits have been filed against ICCL members seeking injunctions under the ADA to cease cruises pending physical reconstruction of ships and/or adoption of different policies and procedures to meet nonexistent standards.[12] Most of these actions have demanded compliance with shore side "ADA Accessibility Guidelines for Buildings and Facilities" ("ADAAG"). The DOJ has intervened in many of these suits, advancing the view that Title III applies to foreign ships. Paradoxically, DOJ

[12] In addition to the *Stevens* and *Spector* decisions, *supra*, reported cases include: *Deck v. American Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057 (D. Haw. 1999) [rejecting claims under ADA's con-struction and alteration provisions when no regulations exist]; *Resnick v. Magical Cruise Co. Ltd.*, 148 F. Supp. 2d 1298 (M.D. Fla. 2001) [no relief available under ADA's construction and barrier removal provisions in the absence of cruise line regulations]; *Access Now, Inc. V. Holland Am. Line-Westours, Inc.*, and *Costa Crociere, S.P.A.*, 147 F. Supp. 2d 1311 (S.D. Fla. 2001) [denying motions to dismiss and permitting cases to proceed despite absence of applicable cruise line regulations]; *Assoc. for Disabled Americans, Inc. v. Concorde Gaming Corp.*, 158 F. Supp. 2d 1353 (S.D. Fla. 2001) [applying Title III's barrier removal provisions to casino cruise ship]. *See also* complaints filed in the following actions: *Access Now, Inc. v. Cunard Line Ltd.*, No. 00-7233 (S.D. Fla. 2000); *Access Now, Inc. v. Royal Caribbean Cruises, Ltd.*, No. 00-2255 (S.D. Fla. 2000); *Access Now, Inc. v. Celebrity Cruises, Inc.*, No. 00-2254 (S.D. Fla. 2000); *Access Now, Inc. v. Carnival Corp.*, No. 98-3081 (S.D. Fla. 1998); *Ernst-Rosenkrantz v. Carnival Corp.*, No. 99-0267 (S.D. Fla. 1999); *Walker v. Carnival Cruise Lines*, No. C-98-2926 (N.D. Cal. 1998); *Zetwick v. Carnival Corporation*, No. C-02-0740 (N.D. Cal. 2002). *See also, Giacopini v. Crystal Cruises, Inc.*, No. C-04-1089 (N.D. Cal. 2004) [motion to dismiss granted by Order dated June 25, 2004, adopting *Spector's* holding and rejecting *Stevens*].



simultaneously concedes ADAAG cannot be applied. The PVAAC, the very committee established by the U.S. Access Board to study passenger vessel access with the assistance of a broad spectrum of interested parties, including cruise ship owners and operators, naval architects, marine engineers, port authorities and disability advocates, has agreed that special regulations are essential. In its Final Report, the PVAAC identified numerous specific instances of direct conflict between the ADAAG and SOLAS and U.S. Coast Guard Requirements.[13] The same conclusion was incorporated by DOJ in its own ADA Title III Technical Assistance Manual, which states: "Because of the unique structure of ships, none of the ADAAG technical or scoping standards are appropriate. Until such time as the [Access Board] issues specific standards applicable to ships, there is no requirement that ships be constructed accessibly."[14]

The resulting industry-wide quagmire is not surprising, because cruise ships are vastly different from shore side buildings. At the most basic level, buildings do not move, while ships are constantly affected by six degrees of motion – pitch, roll, heave, surge, sway and yaw. Ships are carefully integrated and complex machines, containing fire safe zones, watertight and automatic fire doors, muster stations, lifeboats, stabilizers, extensive fire fighting and other safety systems, and literally countless other conditions dictating different design limitations from those existing on land. The deck capacity, weight restrictions, steel tensile strength, stability considerations, height of railings, bulkheads, walls, ceilings, and hardware are all different. Ships must float, withstand flooding, listing, or movement in seaways, combat fires in the

[13] Recommendations for Accessibility Guidelines for Passenger Vessels: Final Report December 2000, available at <http://www.access-board.gov/pvaac/commrept/index.htm>.

[14] ADA TECHNICAL ASSISTANCE MANUAL, U.S. DEP'T OF JUSTICE, § III-5.3000, illus. 3 (1993).

middle of the ocean, connect with piers around the world, navigate through canals, sail through shallow or deep waters, and move at sea without injuring passengers.

Buildings are constructed of easily moveable drywall facilitating physical alteration. Patrons can be readily evacuated to adjacent structures, surrounding property, hospitals and shelters. By contrast, ship bulkheads are constructed of solid steel to ensure watertight and fire safe integrity. Vessels and their lifeboats must function as places of safe refuge while at sea. The enormously complex design and function of modern passenger ships require extensive coordination among experts in marine architecture, engineering, operation, safety and disability accommodations, to determine precisely what accessibility standards can be applied on the oceans. This effort must also ensure any regulations do not conflict with shipbuilding standards, international treaties and conventions, and shipping classification society requirements adopted by flag states.

Notwithstanding the statutory and regulatory vacuum concerning Title III, plaintiffs prosecuting ADA accessibility lawsuits against cruise operators have asked each court to decide how ships should be rebuilt, altered or operated to accommodate special needs. The courts are simply not equipped to do so and the results have varied in each jurisdiction. Judges are forced to apply either shore side ADAAG regulations (which directly conflict with international laws), require carriers to modify their vessels or operations to meet wholly undefined and unspecified standards, or not apply the ADA at all. Courts must rely solely upon the conclusions of paid experts as to how the needs of passengers with disabilities should be reconciled with the unique requirements of oceangoing ships. Once a court fashions an order and a cruise line complies, the line has no protection from suits in other jurisdictions by new plaintiffs with different preferences and expert opinions. Such *ad hoc* adjudication inevitably



leads to conflicting results and forum shopping in an industry most in need of national and international uniformity.

If the task of deciding accessibility standards, or whether U.S. law even applies, is left to individual judges, the likelihood of inconsistent standards for each line, or even from ship to ship, is significant. Such a scenario not only creates confusion and conflicts for ship operators, but also results in guests with special needs having great difficulty determining what level of accessibility to expect in the cruise industry as a whole. Should Congress clarify under what circumstances Title III of the ADA can be applied to foreign ships, cruise lines deserve an opportunity to participate in the rule making process and voluntarily comply with specific regulations, before being subjected to conflicting injunctions for failing to implement nonexisting standards.

## II. REQUIRED UNIFORMITY IN ACCESSIBILITY STANDARDS AND MARITIME LAW IS LOST WITHOUT A STATUTORY AND REGULATORY FRAMEWORK.

Congress clearly expressed its desire for a uniform nationwide application of the ADA, the purpose of which was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b). To effectuate its intent, Congress required the DOT and DOJ to create uniform standards for covered entities. However, the current circuit split regarding the applicability of the ADA to foreign cruise ships, as well as the lack of regulations for any passenger vessels, undermines Congress's foundational interest for a clear, comprehensive national application of the Act.

The importance of maritime uniformity is particularly germane to cruise ships sailing throughout the world and subject to a pervasive scheme of national and international

laws, standards and treaties. The regulation of maritime commerce must be uniform and consistent on a domestic and global basis, especially on issues of shipboard design, safety, and construction involving the peculiar technology of travel by sea.

Uniformity of maritime law is a century-old doctrine with its foundation in the United States Constitution. In addition to giving Congress the power to regulate foreign and interstate commerce in the Commerce Clause, Article I, § 8, Clause 3, the Framers also provided in the Admiralty Clause, Article III, § 2, Clause 1, that the federal judicial power extends to "all cases of admiralty and maritime jurisdiction." This latter provision, though on its face only a jurisdictional grant, has long been construed as incorporating the pre-existing law of admiralty into the law of the United States. "A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise." *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545-46 (1828).

The importance of national and international maritime uniformity is well established in the decisions of this Court. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221(1986); *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 601 (1974) *reh. denied*, 415 U.S. 986 (1974); *The Lottawanna*, 88 U.S. (21. Wall.) 558 (1874). The need for uniformity in admiralty matters is so critical that even Congress is limited in its power to authorize the states to adopt rules of law leading to state-by-state variations. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920). This Court aptly stated long ago:

> That we have a maritime law of our own, operative throughout the United States, cannot be doubted . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on ali subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.



*The Lottawanna*, 88 U.S. at 574-75.

The long-established doctrine of uniformity in maritime commerce is being eroded by increasing ADA litigation in various jurisdictions, creating inconsistent rulings on Title III's application and the relevant accessibility standards for cruise ships. Divergent outcomes are plainly untenable in an industry already governed by numerous international conventions setting forth a comprehensive body of applicable standards. The current circuit split on the very issue of whether Title III even applies demonstrates the judiciary's own confusion, and frustrates the required uniform application of laws in maritime matters.

## CONCLUSION

Efficient and safe operation of passenger vessels engaged in international trade is dependent upon clear, consistent standards for the accommodation of persons with disabilities. Any efforts by the United States to regulate foreign cruise ships in this arena must necessarily be deliberate, objective and coordinated, taking into account the complex practical aspects of cruise ships, their structural and technical variations from shore side facilities, and the real potential for conflicts with international standards. Leaving this task to the courts in the absence of congressional direction or regulatory guidance encourages needless litigation, creates a huge waste of judicial resources, and fosters inconsistent results. This Court should accept review not only to resolve the serious conflict in the circuit courts, but also to maintain the Constitutional mandate for maritime uniformity.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: July 2, 2004.

Respectfully submitted,

LAWRENCE W. KAYE
*Counsel of Record*

AKSANA MOSHAIV

KAYE, ROSE & MALTZMAN, LLP

*Attorneys for Amicus Curiae*
International Council of Cruise Lines